

STATE OF MINNESOTA  
OFFICE OF ADMINISTRATIVE HEARINGS  
FOR THE DEPARTMENT OF NATURAL RESOURCES

In the Matter of the Certification of  
the Variance Granted by the City of  
St. Francis to Gerald and Peggy Drum.

FINDINGS OF FACT,  
CONCLUSIONS AND  
RECOMMENDATION

The above-entitled matter came on for hearing before Administrative Law Judge Richard C. Luis on the evening of May 23, 1985 in the St. Francis City Hall. The hearing concluded that evening, and the record in this matter closed on June 5, 1985, with the receipt of a late-filed Exhibit.

A.W. Clapp, III, Special Assistant Attorney General, 2nd Floor, Space Center Building, 444 Lafayette Road, St. Paul, Minnesota 55101, appeared on behalf of the staff of the Minnesota Department of Natural Resources (hereinafter "Agency" or "Department" or "DNR"). Walt Hiller, Acting Mayor, Box 686, St. Francis, Minnesota 55070, appeared on behalf of the City of St. Francis (hereinafter "City" or "St. Francis"). Gerald and Peggy Drum (hereinafter "Applicants"), 3516 Bridge Street, St. Francis, Minnesota 55707, appeared on their own behalf.

This Report is a recommendation, not a final decision. The Commissioner of Natural Resources will make the final decision after a review of the record which may adopt, reject or modify the Findings of Fact, Conclusions, and Recommendations contained herein. Pursuant to Minn. Stat. 14.61, the final decision of the Commissioner shall not be made until this Report has been made available to the parties to the proceeding for at least ten days. An opportunity must be afforded to each party adversely affected by this Report to file exceptions-and present argument to the Commissioner. Parties should contact Joseph N. Alexander, Commissioner of Natural Resources, Box 37, 500 Lafayette Road, St. Paul, Minnesota 55146 to ascertain the procedure for filing exceptions or presenting argument.

STATEMENT OF ISSUE

Whether the Commissioner should certify the variance granted by the City of St. Francis to Gerald and Peggy Drum for the addition of a deck to a restaurant within the setback area on the Rum River in St. Francis, Minnesota.

Based upon all of the proceedings herein, the Administrative Law Judge

makes the following:

#### FINDINGS OF FACT

1. In 1973, the Minnesota Legislature enacted the Minnesota Wild and Scenic Rivers Act (Minn. Stat. 104.31 - 104.40). Under this Act, the whole or any segment of any river and its adjacent lands within Minnesota possessing\_ outstanding scenic, recreational, natural, historical, scientific, or "similar" values was made eligible for inclusion within the state's wild and scenic rivers system.

2. Minn. Stat. 104.34 and 104.35 authorize the Commissioner of Natural Resources to adopt rules designed to protect shorelands within the boundaries of designated wild, scenic and recreational rivers, and further authorize the Commissioner to prepare management plans for the designated lands.

Under the above-noted authorities, the Commissioner designated that portion of the Rum River from the Ogechie Lake spillway (located in Mille Lacs County) to a line crossing the River between the center lines of Rice and Madison Streets in Anoka as a component of the Minnesota wild, scenic and recreational rivers system. See, Minn. Rule 6105.1400.

3. Minn. Stat. 104.36 requires each local government having jurisdiction over land lying within a designated wild, scenic or recreational river area to adopt zoning ordinances in conformity with the management plan adopted by the Commissioner for the particular designated area. In the summer of 1980, the City of St. Francis, which lies along the Rum River in northern Anoka County, adopted Ordinance No. 39 "for the controlling of bluff land and river land development in order to protect the outstanding scenic recreational, natural, historical and scientific values of the Rum River in St. Francis, Minnesota, in a manner consistent with Minn. Stat. 104.31 - 104.40 (and applicable Minnesota Rules).".

4. Section 303 of St. Francis City Ordinance No. 39 provides for a minimum building setback of 75 feet from the ordinary high water mark of the Rum River for any urban, riverside lot with municipal sewer and water service. One such lot, known for purposes of this Report as the property of the Rum River Inn, has been owned by Gerald and Peggy Drum since early 1979.

5. The Rum River Inn is a licensed (strong beer, wine and liquor) restaurant located north of Anoka County Road 24, immediately west of where the road crosses a bridge over the Rum River.

6. Prior to the purchase of the property by the Drums, the Rum River Inn had a reputation as a "biker" bar, and was notorious in the vicinity for the noise, rowdiness and violence generated by its patrons. Incidents of vulgarity, such as loud public profanity and public urination, were common. Local residents were reluctant to bring their families inside and occasionally feared for their own safety if they patronized the establishment. The afore-described period in the Inn's history is one of several "identities" the establishment has possessed since it was originally opened as a stagecoach stop in 1856.

7. After the Drums bought the Rum River Inn, they turned around the atmosphere of the establishment. It is now a locally popular supper club, and

the environment is tasteful and sedate. It is popular as a family restaurant, and the bar area is a low-key supplement to the dining area. The Inn is patronized by St. Francis residents and their families, and is now considered a community asset rather than an "eyesore" or liability.

8. Sometime after March of 1981, the Drums expanded the Rum River Inn by constructing an adjoining deck, extending 46 feet to 61 feet out from the east-side of the original building. The structure is trapezoidal in shape, with

the north and south sides parallel. The west side of the deck is at right angles to the north and south sides, and measures 42 feet. The east side is 45 feet long. See, Ex. 4.

The deck is made of treated pine wood and is surrounded on the north and south sides by seven foot high fences. Its west border is the back of the original Inn, and the east side is bordered by a chest-high fence that affords a view of the Rum River below. The east border is roughly parallel to the west bank of the River. At the time of construction, the deck was expected to have a useful life of 20 years.

9. The horizontal distance from the west bank of the Rum River to the east end of the Rum River Inn's deck is approximately 50 feet. The deck is not visible from the River, nor can it be seen from the opposite bank when leaves are on the hardwood trees along the west bank.

10. The deck described in the preceding two Findings is an aesthetic and economic asset to the Rum River Inn. Its 1461 square feet of planking accommodates several tables and provides an access to a river view, at the edge of the deck, for all patrons of the Inn. Food and beverages are served on the deck during the same hours the restaurant is in operation. The deck is lighted, and contains a center "court" area for a multi-color, lighted fountain surrounded by flowers and grass. The Inn and deck are especially popular with senior citizens, for whom they provide an access to a river view, and with parents of small children, who now have available a clean, safe place for the whole family to enjoy. Before construction of the deck, parents of young children were reluctant to bring their families to the Inn because of the danger of children falling over the east edge of the property and down the steep, 30-foot high river bank. .

11. If the deck of the Rum River Inn were altered to comply with the 75 foot setback requirement of Ordinance No. 39, the Drums would have to "cut off" planking material that constitutes 47.6% of the surface area of the present deck (696 of 1461 square feet). If, however, they "filled in" that portion of the fountain and grass area west of the 75 foot line with planking (forming a solid deck surface) another 423 square feet of surface would be created, leaving the Drums with 81% of their present deck area. Gerald Drum estimates that such reconstruction would cost \$11,250.

12. The Drums undertook construction of the deck after receiving a building permit for the construction from the City's Building Official (and Superintendent of Utilities), Tim Rochel. Mr. Rochel caused the permit to be issued because he thought that the deck would be a "temporary" structure within the meaning of the State Building Code, rather than a "permanent" structure within the the Local Zoning Ordinance. Therefore, no variance hearing was conducted prior to construction. The City now admits that the dock is a "structure" which, absent a variance, is required to be at least 75 feet from the river bank.

13. In July of 1984, Bill Zachmann, Manager of Rum River Operations for the Department's Wild and Scenic Rivers Program, discovered the existence of the Rum River Inn's deck. The east edge of the deck appeared, to Zachmann's eye, to be too close to the river bank. Zachmann subsequently directed Molly

Comeau, a River Hydrologist from his Office, to measure the horizontal distance from the edge of the deck to the river bank.

14. On or about August 8, 1984, Comeau and her supervisor, Kent Lokkesmoe, measured the horizontal distance from the river bank (beginning of non-aquatic vegetation) to the east edge of the Inn's deck. They began at the bottom of the west bank of the River and used the "break tape" method to arrive at a 50-foot horizontal distance. In using the "break tape" method, one person stands at a fixed point with the measuring tape and holds the tape straight up in the air. The second person climbs up the bank and pulls the tape straight out from the point where the first person is holding it to a point on the bank. That horizontal distance is then measured, and the first person then climbs to the point where the stretched-out tape reached the bank. The process is then repeated. The aggregate horizontal distance is ascertained by adding up the total horizontal sub-distances measured.

15. On or about August 9, 1985, St. Francis Building Official Tim Rochel ran a tape measure on a straight line along the slope of the river bank from the southeast corner of the Rum River Inn's deck to the west bank of the Rum River. The distance measured by Rochel in this fashion was 70 feet.

16. In August of 1984, Ms. Comeau wrote to the City of St. Francis and informed it that the Inn's deck appeared to be out of compliance with Ordinance No. 39, and that the deck should be altered in order to comply or be removed. The Drums subsequently applied to the City for a variance from the Ordinance's setback requirement.

17. On December 18, 1984, the City's Planning and Zoning Commission met to consider granting a variance to the Drums in order to allow them to keep their deck in its present configuration. The Commission voted unanimously to recommend granting the variance.

18. On January 7, 1985, the St. Francis City Council granted the Drums' application for a variance. The Council explained its action in a written "Finding of Facts" document, which notes, among other things:

(1) That the DNR's strict regulations on land use in the Rum River Scenic District has resulted in a financial loss to local owners, to the City of St. Francis (in diminished tax base), and in a deprivation of enjoyment of the River by some citizens;

- (2) That the DNR's setback regulations prevent people, in some instances, from seeing and enjoying the Rum River;
- (3) That the Rum River Inn is a historic building that has served the community of St. Francis for many years and currently serves it as a family restaurant;
- (4) That the Inn's deck is a temporary structure that does not interfere with the users of the River or create an unsightly appearance; and
- (5) That the deck, as it exists, provides a place for senior citizens, physically handicapped persons and persons who do not wish to participate in water sports to enjoy the River.



The Council urged the DNR to certify its decision to grant the variance.

19. On February 25, 1985, Larry Seymour, Director of the Division of Waters in the DNR, issued a written denial of certification of the variance granted by the City of St. Francis. From this denial, the City and the Applicants (Gerald and Peggy Drum) duly appealed, and this hearing process followed.

Based upon the foregoing Findings of Fact, the Administrative Law Judge makes the following:

#### CONCLUSIONS

1. The Administrative Law Judge and the Commissioner of Natural Resources have jurisdiction in this matter.

2. All of the procedural requirements of law and rule have been met, and the matter is properly before the Administrative Law Judge.

3. The deck constructed by the Drums is an appurtenance to the Rum River Inn and, as such, is a structure to which a minimum setback distance of 75 feet applies, under 201 and 303 of Ordinance No. 39 of the City of St. Francis. The deck is less than 75 feet from the ordinary high water mark of the River, and thus is in violation of the Ordinance.

4. Removal or alteration of the deck will not result in an "unnecessary hardship" within the meaning and intent of 804(1) of City Ordinance No. 39 or Minn. Rule 6105.0230, subp. 2.B.(1) because a reasonable use exists for the property as a family restaurant even if the Drums are forced to comply with the 75 foot setback requirement.

5. There are no exceptional circumstances unique to the Drums' property which were not created by the Drums that compel granting of the variance application within the meaning of 804(3) of St. Francis Ordinance No. 39 or Minn. Rule 6105.0230, subp. 2.B.(3).

6. Use of the Rum River Inn as a restaurant is permitted by St. Francis Ordinance No. 39 and by the Rum River Management Plan.

7. Granting the variance would not be contrary to the purpose and intent of the zoning provisions within the meaning of Ordinance 804(2) and Rule subp. 2.B.(2); nor will granting the variance alter the essential character of the locality as established by the management plan under Ordinance 804(5) and Rule subp. 2.B(5).

8. The Drums and the City of St. Francis have the burden of proof to show that the certification of the variance should be granted; they have not met this burden.



Based upon the foregoing Conclusions, the Administrative Law Judge makes the following:

#### RECOMMENDATION

IT IS HEREBY RECOMMENDED that the Commissioner of Natural Resources not certify the granting by the City of St. Francis of a variance application to Gerald and Peggy Drum for construction of a deck within the setback area established along the Rum River.

Dated this 5th day of July, 1985.

RICHARD C. LUIS  
Administrative Law Judge

#### NOTICE

Pursuant to Minn. Stat. 14.62, subd. 1, the agency is required to serve its final decision upon each party and the Administrative Law Judge by first class mail.

Reported: Taped

#### MEMORANDUM

Minn. Rule 6105.0230, subp. 2.B. lays out the standards for granting a variance within a designated wild, scenic or recreational river district. It reads, in relevant part:

B. The grant of a variance requires the presence of these conditions:

(1) The strict enforcement of the land use controls will result in unnecessary hardship. "Hardship" as used in connection with the granting of a variance means the property in question cannot be put to a reasonable use under the conditions allowed by the zoning provisions. Economic considerations alone shall not constitute a hardship if any reasonable use for the property exists under the terms of the ordinance.

(2) Granting of the variance is not contrary to the purpose and intent of the zoning provisions herein established by these standards and criteria, and is consistent with the comprehensive management plan adopted by the commissioner.

(3) There are exceptional circumstances unique to the subject property which were not created by the landowner.

(4) Granting of the variance will not allow any use which is neither a permitted or conditional use in the land use district in which the subject property is located.

(5) Granting of the variance will not alter the essential character of the locality as established by the management plan.

Section 804 of St. Francis' Ordinance No. 39 follows the above-quoted Rule, but does not define "hardship" or include the last sentence of subpart B.(1). However, Minn. Stat. 104.36 requires the City to use standards in conformity with those established by the Commissioner (as in Rule 6105), so the definition of "hardship" and the prohibition against economic considerations constituting a hardship if the property can be put to "a reasonable use" are applicable to this situation.

Denial of certification has been recommended herein because the property in question (Rum River Inn) can still be used as a family restaurant without a deck or if the deck is altered to fit into a space more than 75 feet from the river bank. The fact that compliance with the setback rules will be costly to the Drums and/or the City (if, as alleged at the hearing, the City will pay for the error) is immaterial in this case because the property can be used as a restaurant, as it was before the deck was built, if the deck is altered or removed to comply with the Ordinance. Indeed, a deck can be constructed behind the 75 foot line.

There are many compelling equities on the side of the Drums and the City in this case. In fact, the Judge has concluded that certifying the variance would not be contrary to the purpose of the zoning provisions and would not alter the essential character of the locality because the deck cannot be seen from the River. To grant the variance would do nothing to alter the scenic and recreational value of the Rum River. However, the unambiguous language of the Ordinance and Plan prohibit building in the setback zone, regardless of whether the building is visible from the River, if there still exists a "reasonable use" for the property. Under Minn. Stat. 645.16: . . . "When the words of a law-in their application to an existing situation are clear and

free from all ambiguity, the letter of the law shall not be disregarded under the pretext of pursuing the spirit

The Department is concerned that if this variance were certified, there would be numerous requests for others, and chaos would result. In fact, a Department witness testified that it is important "to make an example" of the Rum River Inn. If the setback Ordinance is not interpreted strictly, it is likely that there would be disputes over whether or not structures were visible, whether the test should be "leaves on" or "leaves off", etc. The application of an objective standard (75-foot setback) eliminates those disputes and creates a fixed, known test to determine compliance with the Ordinance.

Since the City and Applicants have not proven that they qualify for the variance because non-certification will result in "unnecessary hardship", they have not met all of the required elements to prevail in this case. See, Hedlund v. City of Maplewood, 366 N.W.2d 624 (Minn.App. 1985).

R.C.L.

